1968

Bartlett Electric, Inc. v. R. Derrell Ballard, Dba Ballard Construction Co., et al : Respondents' and Cross Appellants' Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BARTLETT ELECTRIC, INC.,
a Utah Corporation,
Plaintiff
vs.
R. DERRELL BALLARD, d/b/a
BALLARD CONSTRUCTION
COMPANY, et al.,
Defendants and
Counterclaimants,

R. DERRELL BALLARD, d/b/a
BALLARD CONSTRUCTION
COMPANY, et al.,
Cross Claimant,
Respondent and
Cross Appellant,
vs.
REED M. SMITH, et al.,
Cross Defendants,
Counterclaimants,
Appellants and
Cross Respondents.

Case No.
11302

RESPONDENTS' AND CROSS APPELLANTS' BRIEF

Appeal from Judgment of the Third District Court
for Salt Lake County, Honorable Stewart M. Hanson, Jr.

ROBERT L. SCHMID
NESLEN & MOCK
1000 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for the Respondents
and Cross Appellants

E. J. SKEEN
522 Newhouse Building
Salt Lake City, Utah 84111
Attorney for the Appellants
and Cross Respondents

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RESPONDENTS' AND CROSS APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is a mechanic's lien suit by a contractor against the owner for the balance due on a construction contract. The owner counter-claimed for alleged damages.

DISPOSITION IN THE LOWER COURT

The trial court awarded the contractor a judgment in the amount of $6,316.95 which reflected offsets allowed the owner in the amount of $699.91. The trial court denied the contractor a mechanic's lien and attorney's fees. The owner's claim for damages in the cumulative amount of $23,363.07 was denied except as to the offset of $699.91.

RELIEF SOUGHT ON APPEAL

Respondent - Cross Appellant (the contractor) seeks affirmance of the judgment rendered below except as to the denial of a mechanic's lien and the denial of attorney's fees, as to which two times, the respondent seeks a partial reversal of the judgment with instruction to grant a mechanics' lien and attorney's fees.

STATEMENT OF THE FACTS

Appellants' statement is contravened generally in that it does not present a fair resume' of the evidence adduced at the trial — which would have been helpful to the Court in determining whether there is any substantial evidence to support the judgment. On the contrary, it presents none of the evidence favorable to the judgment but only carefully extracted excerpts favorable to the appellants. Failure to present any of the evidence favorable to the respondents makes that which is presented of questionable value. *Douglas v. Duvall,* 5 Utah 2d 429, 304 P. 2d 373 (1956). Since respondents cannot concur in appellants' statement of the facts, the following statement

of facts supported by the record is presented to serve as a setting for the issues in the case.

By a lease agreement apparently executed in November, 1961, Reed M. Smith and his wife (the appellants herein and hereinafter called the "owner") agreed to construct and to lease to D. C. Stephens and his wife and David C. Stephens and his wife (hereinafter called either the "lessees" or by individual name) a building designed as a laundry and dry cleaning center at 2095 East 13 South, Salt Lake City, Utah (except for a room about 17½ feet by 33 feet at the north end of the building which was not covered by the lease). (Exhibit 6)

Later, by a contract dated January 4, 1962, R. Derrell Ballard (hereinafter called the "contractor") agreed to construct a laundry and dry cleaning building, the design, plans and specifications for which has been prepared by Bruce J. McDermott, a Salt Lake City architect. (Exhibit 1) The contract is on the A.I.A. Short Form for Small Construction Contracts. It specifically provides that work is to commence 90 days after receipt of notice to commence work.

Under the contract, the east wall of the building was to be spaced one full foot distant from a high retaining wall on the adjoining property immediately to the east. (Exhibit 3)

Some delay was encountered in getting a building permit. (R. 267, line 1; R. 268, line 12). Severe freezing and inclement weather set in early in January. (R. 270, line 26; R. 514, line 3; R. 525, line 19; Ex. 33 p. 3; Ex. 34 p. 26) By a letter of January 10, addressed to Mc-

Dermott, receipt of which was admitted by the owner (R. 104) the contractor asked for an extension of time because of the weather and zoning problems. According to the architect's supervisor on the job, Ernest Daniels, this extension was granted. (R. 521, line 17; R. 524, line 24) No contradictory evidence was introduced by the owner.

Immediately upon the first break in the weather in early February, the contractor commenced construction on the building. (R. 268, line 21) Things went along according to the contract until after the footings were in and the forms were prepared for the foundation in accordance with the contract specification that the east wall have a foot of space between it and the adjacent high retaining wall on the property next door. (Ex. 3)

At this juncture, in the contractor's absence, the owner or the architect acting for him, orally interfered with the workmen on the job, requiring them to shift the building so that there would be only six inches between the building and the right retaining wall instead of the one full foot provided by the contract. (R. 345, line 15; R. 306, line 19; R. 358, line 12; R. 320) (Ex. 1)

Under the contract plans, the electrical service hookup was to underground to a utility pole which the plans showed to be on or within a foot or two of the north property line. (R. 244, line 22) In reality the pole was from 10 to 12 feet over into the neighbor's property (R. 23; R. 244, line 25) Though requested to obtain an easement for the underground line, as the contract required him to do, the owner did not obtain such an ease-

ment. (Smiths' Deposition, p. 19) As a matter of necessity an overhead service, satisfactory to the architect and the electrical engineer was installed. (R. 246, lines 15, 28)

On or about April 20, 1962, the lessees commenced installation of their fixtures in the building. (R. 262, line 14; R. 544, line 4)

The contract called for the north room of the building to be only "roughed-in." It was not initially under lease to the Stephens nor to anyone else. According to the owner, the contractor completed certain work called for under the contract — specifically, at least, the tile floor and he painting in this room — in late August or early September, 1962. (R. 399, line 25; R. 493)

There is evidence to the effect that the owner's unauthorized move of the building to just one half of the distance specified in the contract between the east wall and the adjoining high retaining wall necessitated pouring the east foundation solid against the retaining wall. (R. 280; R. 281, line 20) As a consequence, difficulty was encountered in keeping water from seeping into the building in the area along the joint line between the foundation and the block wall on the east side of the building. Several attempts were made by the contractor to correct this problem. The owner also made attempts to reduce the seepage although at one time he unfortunately used hot tar which flowed into the building rather than setting in place. The cumulative effect of these efforts was substantially, and there is evidence, to completely eliminate the water seepage. One of the lessees testified

that it was not coming through any more: "All I know is that it is not coming in any more." (R. 548, line 1) There was no evidence introduced which would indicate that water is presently a problem.

The contractor testified that it was impossible to get cooperation out of the owner with reference to matters involved in the building, including but not limited to the electrical service and the east wall. (R. 46; R. 47)

At one time the contractor sent a letter of intention to terminate, but the record is clear, including the owner's own admissions that the contractor did not, in fact, carry out the suggested termination. (R. 399, line 25; R. 493)

Eventually the contractor filed notice of a mechanic's lien and brought suit for the balance due under the contract, $5,449.00 plus interest, for a lien and for attorney's fees.

The owner counterclaimed claiming alleged damages in the aggregate of $23,363.07.

At the trial conflicting evidence was introduced concerning all the major items and issues in controversy and most of the minor ones.

ARGUMENT

POINT I. THE CONTRACTOR IS ENTITLED TO A MECHANICS' LIEN, A DECREE OF FORECLOSURE THEREOF AND TO ATTORNEY'S FEES.

On October 18, 1962, the contractor recorded a notice of a mechanic's lien.

Of the many fact issues in the case, one that is really not subject to controversy is the question of whether the contractor performed work under the contract within he statutory limit of 80 days prior to the date of filing of his notime of lien. Utah Code Ann. § 38-1-7 (1953).

Reed M. Smith, the owner, testified unequivocably that the contractor performed work under the contract "in the latter part of August or the first part of September," in the following colloquy:

THE COURT: At any rate, for the cost of a vinyl floor you could have rented it to this man for $150 a month?

THE WITNESS: Except at that time Mr. Ballard was still doing work on the job.

THE COURT: All right. Isn't that part of the building?

THE WITNESS: Yes, sir.

BY MR. SCHMID:

Q. What was he doing? He was putting vinyl floor down, wasn't he, painting it?

A. He did, as I said before, in the latter part of August or the first part of September. (R. 493)

The contractor's testimony corroborates that the notice of lien was field within the statutory time limit. (R. 274)

The dates within which the qualifying work must have been done are the 30th of July to the 18th of Octo-

ber. Clearly work done in August and September meets that requirement.

One can only surmize that the denial of the mechanic's lien, foreclosure and attorney's fees resulted from some concept of "fireside" equity. However, the statute is clear and the lien should have been granted with the incidents of foreclosure and attorney's fees which are the means of enforcing the legislatively enunciated policy of protection for the contractor in situations such as this.

Accordingly, the trial court's judgment must be reversed as to this aspect and remanded with instructions to grant a mechanic's lien, decree of foreclosure on it, and to award reasonable attorney's fees.

POINT II. ALL OTHER ASPECTS OF THE JUDGMENT MUST BE AFFIRMED BECAUSE THEY ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

The owner's arguments that the judgment must be reversed — including arguments about the east wall, alleged loss of rent and the listing of items on pages 21 and 22 of the appellants' brief — all fall into the same category. The only issue involved is whether there is any substantial, competent evidence, considering also all inferences properly deducible therefrom, taken in the light most favorable to the judgment to support the judgment. *Culley v. Culley,* 17 Utah 2d 62, 404 P. 2d 657 (1965); *Christensen v. Christensen,* 9 Utah 2d 102, 339 P. 2d 101 (1959).

The order of discussion herein will be the individual items which is appears the owner is complaining about in

his brief, itemized on pages 21 and 22 of his brief. Then will follow a discussion and reference to the evidence supporting the trial court's judgment as to the alleged damages for the east wall and the alleged damages for loss of rent.

Owner's item No. 1. This concerns the east wall and will be discussed later.

Owner's item No. 2. Asphalt work in parking area. The evidence is in conflict. Howard Kent, employee of the lessee, testified to a minimal amount of asphalt difficulty — breakage equivalent only to about two large table tops (referring to counsel tables in the court room). (R. 258, line 1) Eugene Bowers, engineer, manager of Bowers Construction Company, testified that from his observations the patches covered about 100 to 150 square feet and should have cost about 25 cents to 35 cents per square foot if ready for asphalt and an additional ten cents per square foot if not. (R. 572, line 14; R. 580, line 11) He estimated a price of about $25.00 (R. 572, line 19) His prices were based on the assumption a crew was available in the area. (R. 583, line 14) He testified that from his experience, cracking was not abnormal in asphalted areas. (R. 582, line 1)

According to D. C. Stephens, one of the lessees, the contractor had been persuaded to have the asphalt installed under wet conditions much against his better judgment. (R. 260, line 13) The owner testified that he had had a strip 6 feet wide at the west end of the parking lot asphalted, contending that the contractor was obligated to do this under his contract (R. 454, line 9; R. 466, line

15) even though the evidence is otherwise indisputable that the architect directed that asphalt not be insalled on this strip. (R. 278, line 18) (Ex. 17) The owner further admitted that at about the same time as he allegedly had patching done on the parking lot under construction, he also had asphalt work done on another parking lot of his just across the street. (R. 461, line 16) He was directed by the court to produce payment records for this contemporaneous asphalt work across the street. (R. 461, line 28) They were not produced.

Since there was ample evidence to support a finding that the contractor was not liable for even the amount allowed the owner, the owner is in no position to complain.

Owner's item No. 4. Breaking concrete — light standard. Although the owner testified to the payment and the laborer testified to doing the work, there is nothing in the record in any manner to show that this was work which should have been done by the contractor, or if so that he failed correctly to do it. To have awarded damages on the evidence adduced would have been error.

Owner's item No. 5. Welding and resetting light standard. The owner's own witness tetified that the pole had been hit by a truck making it out of true, requiring repair (R. 442, line 9) but without any indication in the record as to who hit it or when. To have allowed this item would have been error.

Owner's item No. 7. Hauling broken concrete. The record is devoid of any intimation that this is work which the contractor should have done. To have allowed it would have been error.

Owner's item No. 9. Installing header box, moving downspout. Although the owner testified to payment for this alleged claim, the record is devoid of any evidence to indicate that this was the contractor's obligation. (We agreed however that $25.00 could be allowed) (R. 161) (See item 12 below.)

Owner's item No. 10. Material and labor to fill in lower ventilator openings. Like other assertions of the owner, this is not only not borne out by the evidence but it contradicted by the testimony of his own agents. Ernest C. Daniels, draftsman-architect who supervised construction on behalf of the owner, testified that the ventilators were properly installed by the contractor, but that later they were moved because of gas fume seepage from the service station on the adjoining property. (R. 520, lines 15, 17; R. 519, line 23)

Owner's item No. 12. Labor, Richard E. Long, painting sand trap cover, digging hole, cleanup. The record is devoid of any evidence that these items were obligations of the contractor. As to the light standard, the owner's witness, Reynolds, testified that a truck had backed into the light standard. (R. 442, line 9) (It would appear that the $25.00 allowed by the trial court under this item probably was intended to have been allowed under item 9 above, but was inadvertently assigned to this one.)

Owner's item No. 13. Cleaning reflectors, rewiring light standard. The owner's own witness testified that this work, which was done in October, might have been naturally required because of the nature of the lights and their open reflectors. (R. 443, line 4)

Owner's item No. 14. Cleaning sand traps. The owner testified that the lessee did this work voluntarily and that his, the owner's, payment for it was equally voluntarily given. (R. 296, line 20)

Owner's item No. 15. Plumbing bid to complete according to specifications. The owner's failure to specify the components of this claim does not assist in discussing it. Part of this aggregate amount appears to represent claims based on alleged use of smaller than specified pipe. It would appear that since there never has been any complaint as to the adequacy of the water supply or capability in the building, and that in fact a pressure reducer was installed by the lessee, that the trial court, for these reasons of credibility, disallowed these aspects of the claim. During construction, it was determined that one specific length of pipe otherwise called for in the specifications was not needed. This item, in the amount of $83.10 was agreed to by the contractor and was allowed by the trial court. Part of the rest of this claim appears to be a claim for fittings allegedly eliminated and for labor saved by the contractor. There is nothing in the record to show where or what fittings, if any, were eliminated. The trial court was correct in ignoring an unproven allegation. The same applies to the alleged claim for labor savings to the contractor, plus the fact that the contractor was not obligated to the owner to expend any specified sums for labor. This again was properly denied by he trial court. The balance of this unsegregated claim is apparently based on an assertion that the contractor was obligated under the contract to use a larger water meter than was installed by the city at the contractor's expense. At no

time, however, has the architect complained of the water meter. It is not on his check list. (Ex. 16) Chidester, the owner's plumbing witness, first testified that a 1½" meter was installed though the contract called for a 2" meter (R. 411, line 19); however, after being given an opportunity to point out to the court where a 2" meter, or any meter for that matter, was specified, he explained that the specifications did not specify a 2" meter, and, in fact, did not specify meter size at all. (R. 416, line 27; R. 417, line 19) As a matter of fact, the expression "water meter" or "meter" with reference to water, does not appear any place in the contract, the plans or the specifications, to the best of counsel's ability to search for such items. Since the contract did not call for any given size water meter, and the service is admittedly more than adequate — even requiring a pressure reducer — it would have been error for the trial court to have allowed this specious claim.

Owner's item No. 16. Difference between the cost of overhead and underground wiring. As let, the contract called for an underground electrical service to the building. The contract plans also showed the utility pole to be on or within a couple of feet of the property line. (R. 244, line 22) (Ex. 3) In fact, however, the utility pole was some 10 to 12 feet over into the neighbor's property. (R. 244, line 25; R. 23) The contract required the owner to obtain needed easements. (Ex. 1, Art. 5) He did not, (Smith's deposition, page 19) although requested by the contractor to do so. (R. 305, line 13) With full knowledge and acquiescence of the architectural supervisor, the decision was made to use an overhead service since the owner had failed to provide the easement for the underground

service. (R. 246, line 15) This was approved by the architect, the owner's agent. (R. 246, line 28) In view of the owner's breach of his obligation to provide the easement, and the approval of the overhead service by his architect, the trial court was correct in its denial of extra damages which would simply have rewarded the owner for his breach .

Owner's item No. 17. Items of credit agreed to by the contractor and not allowed the (sic) court. In a less serious and dignified setting, one mighty simply ask as to this claim "Who is trying to fool whom?" for the simple reason that the record reference cited by the owner refers only to a letter of negotiation requesting payment long prior to suit, on which letter the owner took no action. In reality a credit of $194.00 was allowed. (Contract price, $38,750. $33,107 paid. Amount claimed in suit is $5,449. Credit difference is $194.00.)

Owner's item No. 18. Asphalt work .This item and Item No. 1 deal with the east wall and the alleged damaged claimed relevant thereto, therefore this following portion of the brief will treat all aspects of the east wall claims, some of which are referred to in Point 4 of the owner's brief.

Initially it should be pointed out that while there is evidence that the east wall did leak near the foundation at one time, the final and uncontradicted evidence from the man most likely to know — the lessee — is that the wall does not leak. David C. Stephens, lessee, testified, "All I know is that it is not coming in any more. (R. 548, line 1)

However, if liability for difficulties with the east wall is to be attributed to one of the parties, it must, under the fact, be attributed to the owner whose breach of contract caused the difficulty. The contract called for the contractor to build a building one foot distant from the retaining wall on the adjacent property. It was on this basis that bids were requested, made and the contract let. Had the building been built according to the contract, the difficulty would not have arisen. Instead, however, in the contractor's absence, in gross bad faith and in clear breach of his own contractual duties, the owner or the architect acting at his request ordered a substantial, cardinal, and material deviation from the contract terms by interfering with the work in progress and orally ordering the construction crew to shift the building to only one half the contract distance between it and the retaining wall — a subsantial, a gross and completely intervening alteration. (R. 320, lines 1-23; R. 345, line 15 and following; R. 306, line 19; R. 358, line 12) This change was ordered orally, in the contractor's absence even while the forms were being constructed for the foundation after the footings had been put in, without any prior notice to the contractor even though it appears that both the owner and he architect knew, even at the time of letting the contract, that they would eventually do this. (R. 345, line 25; Smith's Deposition, p. 22) Such a substantial change, one not complying with the terms of the contract, constitutes a substantial breach of the contract by the owner for the consequences of which he must be responsible.

There is competent evidence in the record that this unauthorized change made double forming impossible,

requiring only single forming, which was acquiesced in and approved by the architectural supervisor. (R. 280; R. 281, line 20)

Even assuming that the contractor should bear the cost needed to insure waterproofing of the wall as a matter of precaution, the trial court was generous in allowing $150.00 for this because the uncontradicted, competent evidence of experts is that it can properly be done for less. Jack Duncan, a waterproofing expert with over 15 years experience in this type of work testified that it could be done for $85.00. (R. 528, lines 3, 9; R. 529, lines 15-30) He had done this type work successfully previously. (R. 530, line 27) There would be no danger of erosion of the mortar. (R. 533, lines 18, 30) It would actually withstand several feet of hydrostatic pressure on the other side. (R. 538, line 14)

Lynn C. Layton, of Layton Roofing Company, with over 30 years experience including waterproofing of walls, testified that the waterproofing would cost no more than $100.00. (R. 554, through 556)

Eugene Bowers, general manager of Bowers Construction Company, a graduate of Annapolis Naval Academy with studies of water and the effect of hydrostatic pressure (R. 568, lines 6-30; R. 569, line 5) and who had had experience with similar leakage problems similarly testified that the methods described by Mr. Duncan would work very successfully. He had utilized similar experts and methods to cure leakage problems even under an actual hydrostatic head. (R. 569, lines 8-16)

There is thus ample, substantial, competent evidence

to support the judgment. To require tearing the wall down and rebuilding it when the cause of the trouble lies with the owner and can be corrected for a nominal sum would be ludicrous travesty on justice. *Bingham v. Stevenson,* 420 P. 2d 839 (Mont. 1966); *Williams v. Nall,* 4 Ariz. App. 416, 420 P. 2d 988 (1966).

There is equally no merit to the owner's assertions that it is entitled to alleged loss of rent because of unjustified delay in completing the building. The evidence is all to the contrary.

While the lease between the owner and the lessee provided that the owner would have the building "ready for fixtures on or before April 1, 1962," (Ex. 6, p. 2) the contract between the owner and the contractor which is dated January 4 provided that the building would be completed "ninety calendar (90) days after receipt of notic eto commence work." (Ex. 1) There is no evidence in the record of the date of any notice, if any was given, to commence work given to the contractor despite the specific requirement of the giving of notice.

The reference by the owner in his brief to the comment in the bidding instructions that work would commence five days after letting the contract is grossly misleading. The specifications, not he bidding insructions, are part of the contract. It is elementary that the bidding instructions and information are superseded by the actual contract, which in this case specifically and clearly called for the giving of notice to commence in order to start the clock running.

Even at that, the date for completion of the building

on the part of the contractor would not have met the date the owner had promised the lessees.

The evidence showed that there was a delay in getting a building permit. (R. 267, line 1; R. 268, line 12) Within a few days very inclement weather set in, so bad that the ground froze solid. (R. 270, line 26; R. 514, line 3; R. 525, line 19; Ex. 33, 34 and 35. See particularly Ex. 33, p. 3 and Ex. 34, page 26, which have "Daily Soil Temperatures" charts showing that the ground was frozen from about the first of January, reaching a depth of 20 inches by January 12 and remaining frozen to this depth until the 12th of February.)

The evidence shows that during this time, by a letter dated January 10, 1962, and received by McDermott on or before January 12, 1962 (Request for admissions in file, R. 104), the contractor requested an extension of time because of the weather and the zoning problems. There is competent evidence that the extension was granted. (R. 521, lines 17, 23; R. 524, line 24). There is no contradictory evidence. By about mid-February the ground had thawed sufficiently to permit commencement of construction. (R. 268, line 21)

By about April 20, the lessees commenced installing their fixtures. (R. 262, line 14; R. 544, line 4)

Before discussing the effect of the terms of the lease between the owner and the lessees, it must be noted that there is no evidence from anyone that the contractor was informed of he specific monetary, and particularly the specific "penalty" provisions of the lease until litigation developed.

However, under the terms of the lease — unknown to the contractor—the lessees were to pay the owner $100.00 per month (apparently commencing December 1, 1961) until the "proposed building is finished and ready for occupancy." The building shall be considered as ready for occupancy on the first of the calendar month after the month in which the building is completed in accordance with the paragraph CONSTRUCTION *and after posession thereof has been tendered to LESSEE.*" (emphasis added) (Ex. 6) The CONSTRUCTION paragraph of the lease provides that "The construction shall be completed by SMITH ready for fixtures on or before April 1, 1962." It then further provides, as between the owner and the lessees, that if the building is not completed on the specified date (April 1), then the owner shall pay a penalty to the lessees of $20.00 per day until the advance rentals are thereby absorbed. The regular rent on the laundry and dry cleaning portion of the building was to be $525.00 per month.

There is evidence that the lessees made the following payments:

December 1, 1961	$100.00
January 2, 1962	$100.00
February 1, 1962	$100.00
February 28, 1962	$100.00
April 2, 1962	$100.00

(This even though the lease provisions specified that the building should be ready by April 1)

June 1, 1962	$ 25.00
July 2, 1962	$525.00

The following then appears to be the time schedule of events:

December 1, 1961	$100.00 advance rent paid.
January 2, 1962	$100.00 advance rent paid.
January 4, 1962	Contract let.
January 10, 1962	Contractor's request for extension of time because of weather and zoning.
January 19, 1962	Building permit granted.
February 1, 1962	$100.00 advance rent paid.
February 11, 1962	Thaw permitted start of construction.
February 28, 1962	$100.00 advance rent paid.
April 2, 1962	$100.00 advance rent paid.
April 20, 1962	Lessees commenced installing fixtures.
May 12, 1962	90 days from February 11.
May 29 or June 1, 1962	Lessees opened to public.
June 1, 1962	$ 25.00 rent paid by lessees.
July 1, 1962	$525.00 rent paid by lessees.

The lease frankly denominated the $20.00 per day as a "penalty" which, as such, would not have been enforcable by the lessees against the owner. It was not liquidated damages, nor were these terms even known to the contractor.

There is ample, substantial evidence to support the trial court's denial of loss of rent on this portion of the

building on any of several theories. These include but need not be limited to the setting in of weather so inclement as to preclude construction until in February; or the fact that no notice to commence was ever given; or the extension granted by the architect; or that it was within the owner's power — with reference to the lessees — to determine when he would deem the building completed for the purposes of rent payment; or that the terms of the lease were not disclosed to the contractor and therefore he is not liable for special damages, even if enforceable between the parties.

In any event, since the lessees commenced installing their fixtures on or about April 20, 1962, the owner was entitled to start collecting rent on May 1, with no loss to himself.

Under these circumstances it cannot be said that there is not substantial, competent evidence to support the trial court's denial of damages for loss of rent on the laundry and dry cleaning portion of the building.

Equally, there is no basis for assessing loss of rent as to the small north room of the building. This portion was only to be "roughed-in" by the contractor. All that might have prevented the owner from leasing this room — assuming a renter — was the tile on the floor and paint, according to the owner's testimony. (R. 401, lines 16-22) According to the owner, the contractor did this remaining contract work in the last of August or the first of September. (R. 399, line 25) Even then it was not rented until in November. (R. 398, line 4)

As the judge stated during the trial, the owner could

not sit back and charge the contractor for rent when a small expenditure for tile and paint would have put the room in a rentable condition. (R. 398, line 28; R. 401, line 25; R. 402, line 2) Even at that, there is no evidence that the owner actually could have rented it on any specific terms.

POINT III. THERE IS NO MERIT TO THE CONTENTION THAT THE CONTRACTOR WAS REQUIRED TO PLEAD AND PROVE CERTIFICATION BY THE ARCHITECT AS A CONDITION OF RECOVERY BY SUIT.

A careful reading of the terms of the contract does not indicate that the decisions of the architect are either the only means whereby the contractor can obtain pay nor are they final and conclusive on anybody. Under Article 18 of the General Conditions the decisions of the architect are not only not final and conclusive on anybody, but they are specifically even subject to arbitration. (Ex. 1)

The authorities cited by the appellant actually support the position that "(T)he court should not imply an agreement to submit to an architect or engineer matters arising under a building or construction contract, but should require clear and express language, because it is contracting away the right of the parties to appeal to the courts of justice in case of controversy," *Anno.,* 54 A.L.R. 1255, 1256; *Central Trust Co. v. Louisville, St. L. & T. R. Co.,* 70 Fed. 282, 285 (1895). As expressed in *Jefferson Hotel Co. v. Brumbauch,* 168 Fed. 867 (1909), "Where the stipulation does not provide that the decision of the

engineer shall be final and conclusive, it is merely prima facie evidence of the matters decided."

But to make such a certificate or decision conclusive requires plain language in the contract. It is not to be implied. Anno. 54 A.L.R. 1255; *Ryan v. Curlew Irrig. & Reservoir Co.,* 36 Utah 382, 104 Pac. 218 (1912).

Since there is no language in the contract purporting to make the decision of the architect a condition precedent to payment or recovery by suit, or final and conclusive, these arguments of the appellant, not pleaded or raised below, are nonpersuasive.

CONCLUSION

For the reasons stated herein, the respondents respectfully pray this Court to issue its order:

1. Directing the trial court to grant a mechanic's lien, foreclosure thereof, and reasonable attorney's fees to the respondent-contractor.

2. And otherwise to affirm the judgment of the trial court.

Respectfully submitted,

NESLEN AND MOCK
1000 Continental Bank Building
Salt Lake City, Utah

By ROBERT L. SCHMID
Attorneys for the Respondents and Cross Appellants